

Office of Chief Counsel  
Internal Revenue Service  
**Memorandum**

Number: **200923028**

Release Date: 6/5/2009

CC:PA:01

POSTN-144754-08

UILC: 6663.00-00, 6701.01-00, 7405.00-00

date: January 05, 2009

to: Jeffrey L. Heinkel  
Associate Area Counsel (Area 7)  
(Small Business/Self-Employed)

from: Charles A. Hall  
Senior Technician Reviewer, Branch 1  
(Procedure & Administration)

---

subject: Imposition of penalties with respect to a bogus return

This Chief Counsel Advice responds to your October 17, 2008 request for assistance.  
This advice may not be used or cited as precedent.

LEGEND

W =

H =

Y0 =

Y1 =

Y2 =

Y3 =

PIN 1 =

PIN 2 =

### ISSUES

1. Whether the Service can impose the fraud penalty under section 6663 against a wife (W) who filed a bogus return in her husband's (H) name.
2. Whether the Service can impose the section 6701 penalty for aiding in the understatement of tax against W for filing a bogus return in H's name.
3. Whether any other penalties can be imposed against W.

### CONCLUSIONS

1. The Service cannot impose the section 6663 penalty against W because the bogus return is invalid.
2. The Service cannot impose the section 6701 penalty against W because the bogus return is invalid.
3. No penalties under our jurisdiction apply to the facts of this case.

### FACTS

H and W were married during Y1. In Y2, separate federal income tax returns were filed electronically in H and W's names for taxable year Y1. Each return claimed head of household status and the earned income credit (EIC). H's return listed W as a third party designee. The Service processed both returns and issued refunds to both taxpayers, based upon the EIC. Each refund was deposited in the bank account identified on the respective return.

H and W separated sometime during Y2. In Y3, H informed the Service that W had filed H's Y1 return without his knowledge. H was incarcerated during Y1 and at the time the returns for Y1 were filed in Y2 and claims that he did not earn any income in Y1. Therefore, H was not required to file a return for Y1 and did not intend to file one for Y1 in Y2. H subsequently submitted a paper return to the Service for Y1. The Service then began an investigation. Upon examination, both of the returns filed for Y1 in Y2 identified the same bank account as the account into which to deposit the refunds. The bank account is in H's name but W had access to the account. H claims he did not receive any refund and that W kept both refunds. In addition, the personal identification number (PIN) on H's Y1 return is the same one that had been used previously by W not H. Both Y1 returns used PIN 1. W's Y0 return used PIN 1. H's Y0 and Y3 returns used PIN 2. No return was filed in H's name for Y2. No other returns for H (besides Y1) used PIN 1. W has signed an affidavit under oath stating that she "filed taxes in the name of [H]... without his knowledge for the Y1 tax year."

LAW AND ANALYSIS*H's Y1 return is invalid*

A valid return is a document that: (1) purports to be a return, (2) is executed under penalties of perjury, (3) reports sufficient data to calculate the tax liability, and (4) most importantly, constitutes an honest and reasonable attempt to satisfy the requirements of the law. See Beard v. Commissioner, 82 T.C. 766 (1984), aff'd 793 F.2d 139. (6<sup>th</sup> Cir. 1986).

The signature requirement derives from section 6065, which provides that generally, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under penalties of perjury. The purpose of this requirement is to authenticate the signed document, and to verify its truthfulness. Thus, if a return is not properly signed by the taxpayer, the return is invalid. Such a return remains invalid even if the Service processes the return. See Ulicher v. Commissioner, T.C. Memo. 2002-55.

The signature requirements for electronically filed returns are the same as those for paper returns. I.R.M. §§ 3.42.5.16.8.1 and 3.42.5.16.1.1. Taxpayers may create their own Personal Identification Number (PIN) and file a completely paperless return through their tax preparation software or their tax professional. I.R.M. §§ 3.42.5.16.1.1 and 3.42.1.3.1(1) c. The mere existence of an electronic signature does not cause it to be valid if there are indications of invalidity. See I.R.M. § 3.42.5.16.1.1.

In the instant case, there are indications of an invalid signature. The same PIN was used for both spouse's Y1 returns. H has never used that PIN but W has. Furthermore, W admitted filing the return without H's knowledge. None of the exceptions that would allow someone to sign on behalf of another apply here. Therefore, the Y1 return was not verified and signed by the H and cannot be a valid return for H for Y1. If the paper return that H subsequently submitted to the Service for Y1 is a valid return, then the Service should process that return, if it has not already done so, and adjust H's accounts accordingly.

The refund issued with respect to H's invalid electronic return for Y1 is an erroneous refund. See I.R.C. §§ 7405 and 6532(b). The Manual/Erroneous Refunds division in Fresno Submission Processing, Accounting Operations Service can pursue the refund administratively from W, as she is the person that received the refund. If administrative procedures are not effective, the Service can request that the Department of Justice file an erroneous refund suit against W.

*Section 6663 penalty does not apply*

If any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud. I.R.C. § 6663(a). The Commissioner has the burden of proving that some portion of an underpayment is due to fraud by clear and convincing evidence. I.R.C. § 7454(a); Tax Court Rule 142(b). Fraud is shown by proof that the taxpayer intended to conceal, mislead or otherwise prevent the collection of his or her taxes, and that there is an underpayment of taxes. Stoltzfus v. United States, 398 F.2d 1002, 1004 (3rd Cir. 1968); Rowlee v. Commissioner, 80 T.C. 1111, 1123 (1983).

Section 6664 contains definitions and special rules that apply to the fraud penalty under section 6663 and the accuracy-related penalties under sections 6662 and 6662A. Under section 6664(b), those penalties shall not apply where no return is filed. When a return is determined to be invalid, it is a nullity and, thus, it is as if no return has been filed. Accordingly, the section 6663 penalty cannot apply here against either H or W. See Turner v. Commissioner, T.C. Memo. 2004-251 (holding that, pursuant to section 6664(b), the section 6662 penalty could not apply because the return was invalid).

#### *Section 6701 penalty does not apply*

Section 6701 provides for a penalty for aiding and abetting the understatement of tax liability. No return needs to be filed for the penalty to be imposed. See Kuchan v. United States, 679 F.Supp. 764, 768-69 (N.D. IL 1988). It does not appear based on the facts presented that W aided, assisted, or advised H with respect to the bogus return, as H did not request W's assistance with filing a return and in fact had no knowledge that a return was being prepared on his behalf and did not intend to file the bogus return. The legislative history to section 6701, enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982, notes that this penalty was intended as the civil corollary to the criminal penalty for aiding and abetting, which is section 7206(2). S. Rep. No. 97-494(I), at 275 (1982); H.R. Rep. No. 97-760, at 576 (1982) (Conf. Rep.). The legislative history notes that the purpose of the penalty is to "protect taxpayers from advisors who seek to profit by leading innocent taxpayers into fraudulent conduct." S. Rep. No. 97-494(I), at 275 (1982). W's conduct, while fraudulent, is not the type of conduct Congress intended to penalize under section 6701.

#### *No other penalties seem to apply*

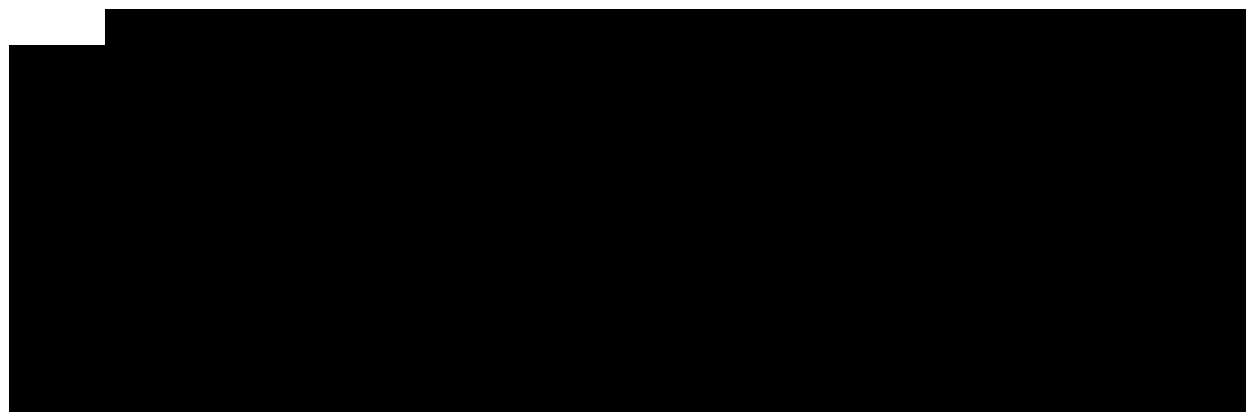
This office handles a variety of penalties. Penalties are determined based on the specific facts and circumstances of each case, so it can be difficult to generalize about them. We do not address here all of the penalties within our jurisdiction, as many plainly would not apply. Therefore, only certain penalties are discussed below. For more information on penalties, refer to IRM 20.1.

Section 6702 provides a penalty for frivolous returns.<sup>1</sup> The penalty is imposed on any individual who files a tax return that, in relevant part, either “does not contain information on which the substantial correctness of the self-assessment may be judged” or “contains information that on its face indicates that the self-assessment is substantially incorrect.” I.R.C. § 6702(a)(1). Due to the nature of the false information reported on the bogus return, it was not evident from looking at the return that the information was not correct and that the self-assessment was in error. Therefore, the frivolous return penalty does not apply.

A new penalty was enacted as section 6676 (“Erroneous Claim for Refund or Credit”) on May 25, 2007, as part of the Small Business and Work Opportunity Tax Act of 2007. Section 6676 provides for a penalty in the case of a claim made for refund or credit of income tax where the amount of such claim is “excessive” unless it is shown that a reasonable basis exists for the claim. I.R.C. § 6676(a). The penalty applies to claims filed after May 25, 2007. The penalty is equal to 20% of the excessive amount claimed, which is defined as the difference between the amount sought in the claim and the amount of the claim actually allowed. I.R.C. § 6676(a), (b). The penalty does not apply to a claim for a refund or credit relating to the earned income credit. I.R.C. § 6676(a). The penalty does not apply to this case, as the bogus return was filed before May 25, 2007. Furthermore, as the false refund related to the earned income credit, it would not apply to a similar case in which the return was filed after the effective date of the statute. We note, however, that such a penalty could apply to other bogus return cases in which an excessive refund is claimed.


As H did not hire W to prepare a return for him, none of preparer penalties (e.g. sections 6694 and 6695) apply to this case. See I.R.C. 7701(a)(36). Criminal penalties may apply to W but such penalties are outside our jurisdiction. For example, W may have filed a false or fraudulent return in violation of section 7206(1).

#### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



---

<sup>1</sup> The penalty was amended in 2006 but the penalty, as amended, does not apply to this case.



This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

If you have any further questions, please call (202) 622-4910.